

the reasonable application of TELRIC principles would produce.”¹²⁹ We note that different states may reach different results that are each within the range of what a reasonable application of TELRIC principles would produce. Accordingly, an input rejected elsewhere might be reasonable under the specific circumstances here.

36. The analytical framework we employ to review section 271 applications in these situations is well established. As the Commission’s previous decisions make clear, a BOC may submit as part of its *prima facie* case a valid pricing determination from a state commission. In such cases, we will conclude that the BOC meets the TELRIC pricing requirements of section 271 unless we find that the determination violates basic TELRIC principles or contains clear errors of fact on matters so substantial that the end result falls outside the range that a reasonable application of TELRIC principles would produce.¹³⁰ Once the BOC makes a *prima facie* case of compliance, the objecting party must proffer evidence that persuasively rebuts the BOC’s *prima facie* showing. The burden then shifts to the BOC to demonstrate the validity of its evidence or the state commission’s approval of the disputed rate or charge.¹³¹ When a party raises a challenge related to a pricing issue for the first time in the Commission’s section 271 proceedings without showing why it was not possible to raise it before the state commission, we may exercise our discretion to give this challenge little weight. In such cases, we will not find that the objecting party persuasively rebuts the *prima facie* showing of TELRIC compliance if the BOC provides a reasonable explanation concerning the issue raised by the objecting party.

37. With these principles in mind and after thoroughly reviewing the record in this application, we find that SBC’s UNE rates in Illinois, Indiana, Ohio, and Wisconsin are just, reasonable, and nondiscriminatory, and satisfy checklist item two. Below we first summarize the individual state proceedings and discuss our analysis of state-specific issues that were raised by commenting parties. Following the state-specific analysis, we discuss commenter arguments and our conclusions regarding pricing issues that concern two or more states.

a. Illinois

(i) Background

38. In a series of proceedings beginning in 1996, the Illinois Commission investigated SBC’s cost submissions and established rates for the provision of UNEs, interconnection, and

¹²⁹ *Verizon Pennsylvania Order*, 16 FCC Rcd at 17453, para. 55 (citations omitted).

¹³⁰ See, e.g., *Application by Verizon New Jersey, Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks Inc., and Verizon Select Services Inc., for Authorization to Provide In-Region, InterLATA Services in New Jersey*, CC Docket No. 02-67, Memorandum Opinion and Order, 17 FCC Rcd 12275, 12305, para. 68 (2002) (*Verizon New Jersey Order*).

¹³¹ *Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in Louisiana*, CC Docket No. 98-121, Memorandum Opinion and Order, 13 FCC Rcd 20599, 20635-39, paras. 51-59 (1998) (*Second BellSouth Louisiana Order*).

local transport and termination.¹³² In the course of its evaluation and findings, the Illinois Commission consistently demonstrated its commitment to TELRIC principles.¹³³ The Illinois Commission required SBC to make numerous modifications to its proposed cost study assumptions based on the evidence submitted by competitive LECs and commission staff.¹³⁴ The Illinois Commission ordered the use of a 9.52 percent cost of capital and FCC-prescribed depreciation lives, and made other determinations with respect to fill factors, shared and common cost factors, switching, non-recurring charges, and collocation.¹³⁵ Subsequent to the *Illinois TELRIC Order*, the Illinois Commission required SBC to make further changes to its rate structures and prices for non-recurring charges (NRCs) and UNE combinations.¹³⁶ In response to the Commission's *UNE Remand Order*,¹³⁷ *Line Sharing Order*,¹³⁸ and *SBC/Ameritech Merger Order*,¹³⁹ the Illinois Commission examined SBC's provision of additional UNEs, including line

¹³² *Investigation into Forward Looking Cost Studies and Rates of Ameritech Illinois for Interconnection, Network Elements, Transport and Termination of Traffic; Illinois Bell Telephone Company Proposed Rates, Terms and Conditions for Unbundled Network Elements*, ICC Docket Nos. 96-0486/0569 Consol., Second Interim Order (Illinois Commission Feb. 17, 1998) (*Illinois TELRIC Order*). The *Illinois TELRIC Order* was amended from an interim order to a final order by the Illinois Commission on April 6, 1998. *Investigation into Forward Looking Cost Studies and Rates of Ameritech Illinois for Interconnection, Network Elements, Transport and Termination of Traffic; Illinois Bell Telephone Company Proposed Rates, Terms and Conditions for Unbundled Network Elements*, ICC Docket Nos. 96-0486/0569 Consol., Amendatory Order (Illinois Commission Apr. 6, 1998). See also *Investigation into the Compliance of Illinois Bell Telephone Company with the Order in Docket 96-0486/0569 Consolidated Regarding the Filing of Tariffs and the Accompanying Cost Studies for Interconnection, Unbundled Network Elements and Local Transport and Termination Regarding End to End Bundling Issues*, ICC Docket No. 98-0396, Order (Illinois Commission Oct. 16, 2001) (*Illinois TELRIC Compliance Order*); *Investigation into the Compliance of Illinois Bell Telephone Company with the Order in Docket 96-0486/0569 Consolidated Regarding the Filing of Tariffs and the Accompanying Cost Studies for Interconnection, Unbundled Network Elements and Local Transport and Termination Regarding End to End Bundling Issues*, ICC Docket No. 98-0396, Order on Reopening (Illinois Commission Apr. 30, 2002) (*Illinois TELRIC Compliance Order on Reopening*).

¹³³ *Illinois TELRIC Order* at 5.

¹³⁴ SBC Application App. A Vol. 11, Tab 35, Affidavit of Barbara A. Smith Regarding Illinois (SBC Smith Illinois Aff.) at para. 11. See also, generally, *Illinois TELRIC Order*.

¹³⁵ *Illinois TELRIC Order* at 3, 11-12, 28-29, 32-35, 47-54, 58-59, 88-90, 95-98.

¹³⁶ *Illinois TELRIC Compliance Order* at 95-97; *Illinois TELRIC Compliance Order on Reopening* at 11, 33-34.

¹³⁷ *UNE Remand Order*, 15 FCC Rcd 3696.

¹³⁸ *Line Sharing Order*, 14 FCC Rcd 20912.

¹³⁹ *Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, for Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission's Rules*, CC Docket No. 98-141, Memorandum Opinion and Order, 14 FCC Rcd 14712 (1999) (*SBC/Ameritech Merger Order*), vacated in part, *Ass'n of Communications Enterprises v. FCC*, 235 F.3d 662 (D.C. Cir. 2001).

sharing,¹⁴⁰ and shared transport.¹⁴¹

39. On October 24, 2001, the Illinois Commission initiated a proceeding to review Illinois Bell's compliance with section 271 of the Telecommunications Act of 1996.¹⁴² The Illinois Commission served a copy of the *Illinois Section 271 Proceeding Initiating Order* on every competitive LEC licensed to provide basic local exchange service in SBC's Illinois service area.¹⁴³ All parties were afforded the opportunity to file testimony, comments, and reply comments throughout the proceeding.¹⁴⁴ Phase I of the proceeding examined SBC's compliance with the section 271 competitive checklist, and Phase II addressed SBC's performance results on checklist items, OSS issues, performance measures and the performance remedy plan.¹⁴⁵ In Phase I of the proceeding, the Illinois Commission required SBC to make several demonstrations regarding UNEs.¹⁴⁶ Specifically, the Illinois Commission required SBC to demonstrate that: competitors can opt into UNE offerings in tariffs or interconnection agreements without unnecessary restrictions; UNE rates are clearly defined; interim rates and rates not yet reviewed by the commission fall within a TELRIC zone of reasonableness; combination rates for UNE-P and enhanced extended links (EELs) are clearly defined; and UNE-P and EEL combination rates have been found to be TELRIC-based by the commission, or are within a TELRIC zone of reasonableness.¹⁴⁷ The Illinois Commission also required SBC to provide in its tariffs true-ups for interim rates to February 6, 2003, the effective date of the *Illinois Section 271 Phase I Order*,

¹⁴⁰ *Illinois Bell Telephone Company, Proposed Implementation of High Frequency Portion of Loop (HFPL)/Line Sharing Service (Tariffs Filed April 21, 2000)*, ICC Docket No. 00-0393, Order (Illinois Commission Mar. 14, 2001); *Illinois Bell Telephone Company, Proposed Implementation of High Frequency Portion of Loop (HFPL)/Line Sharing Service (Tariffs Filed April 21, 2000)*, ICC Docket No. 00-0393, Amendatory Order (Illinois Commission May 1, 2001); *Illinois Bell Telephone Company, Proposed Implementation of High Frequency Portion of Loop (HFPL)/Line Sharing Service (Tariffs Filed April 21, 2000)*, ICC Docket No. 00-0393, Order on Rehearing (Illinois Commission Sept. 26, 2001); *Illinois Bell Telephone Company, Proposed Implementation of High Frequency Portion of Loop (HFPL)/Line Sharing Service (Tariffs Filed April 21, 2000)*, ICC Docket No. 00-0393, Amendatory Order (Illinois Commission Oct. 16, 2001); *Illinois Bell Telephone Company, Proposed Implementation of High Frequency Portion of Loop (HFPL)/Line Sharing Service (Tariffs Filed April 21, 2000)*, ICC Docket No. 00-0393, Order on Second Rehearing (Illinois Commission Mar. 28, 2002).

¹⁴¹ *Illinois Commerce Commission on Its Own Motion, Investigation into Tariff Providing Unbundled Local Switching with Shared Transport*, ICC Docket No. 00-0700, Order (Illinois Commission July 10, 2002).

¹⁴² See *Illinois Section 271 Proceeding Initiating Order*.

¹⁴³ SBC Johnson Aff. at para. 13.

¹⁴⁴ SBC Johnson Aff. at para. 15.

¹⁴⁵ SBC Johnson Aff. at para. 40, citing *Illinois Section 271 Proceeding Initiating Order* at 3-4.

¹⁴⁶ *Illinois Commerce Commission on Its Own Motion, Investigation Concerning Illinois Bell Telephone Company's Compliance with Section 271 of the Telecommunications Act of 1996*, ICC Docket No. 01-0662, Phase I Interim Order on Investigation, 174-75 (Illinois Commission Feb. 6, 2003) (*Illinois Section 271 Phase I Order*).

¹⁴⁷ See *Illinois Section 271 Phase I Order* at 174-75.

and to initiate a proceeding to investigate the interim rates for dark fiber, subloops, and CNAM database queries.¹⁴⁸ In its May 13, 2003 order in this docket, the Illinois Commission conditioned its endorsement of SBC's section 271 application for Illinois on SBC's commitment to remedy these issues.¹⁴⁹ In its comments on SBC's section 271 application the Illinois Commission includes an attachment demonstrating that SBC has completed its commitments regarding UNE rates.¹⁵⁰

40. On May 9, 2003, the Illinois General Assembly passed and the governor signed into law Illinois Public Act 93-005, which created sections 13-408 and 13-409 of the Illinois Public Utilities Act.¹⁵¹ These statutory provisions direct the Illinois Commission to calculate UNE loop rates using current actual fill factors,¹⁵² and depreciation rates based on the economic lives reflected in the incumbent LEC's books of account.¹⁵³ The legislation directed the Illinois Commission to make the required rate adjustments within 30 days of the effective date of the legislation.¹⁵⁴ The Illinois Commission issued an order on June 9, 2003 enacting the legislation and adopting increased UNE loop rates.¹⁵⁵ Also on June 9, 2003, the United States District Court for the Northern District of Illinois, Eastern Division, enjoined SBC from implementing the legislation.¹⁵⁶ SBC has appealed the district court's decision and this appeal is pending before the United States Court of Appeals for the Seventh Circuit.¹⁵⁷

(ii) Discussion

41. *Illinois Legislation.* The ACN Group argues that sections 13-408 and 13-409 of the Illinois Public Utilities Act preclude a finding that SBC satisfies the requirements of checklist

¹⁴⁸ *Illinois Section 271 Phase I Order* at 170, 177.

¹⁴⁹ *Illinois Section 271 Order* at 916.

¹⁵⁰ Illinois Commission Comments, Attach. A at 1-3.

¹⁵¹ 220 Ill. Comp. Stat. 5/13-408, 13-409.

¹⁵² A "fill factor" is the estimate of the proportion of the facility that will be used.

¹⁵³ "Depreciation rates" represent the amount of time over which an asset will be depreciated for accounting purposes.

¹⁵⁴ 22 Ill. Comp. Stat. 5/13-408(c).

¹⁵⁵ *Petition to Determine Adjustments to UNE Loop Rates Pursuant to Section 13-408 of the Illinois Public Utilities Act*, ICC Docket No. 03-0323, Order (Illinois Commission June 9, 2003). This order increased the rates for 2-wire loops from \$2.59 to \$5.12 in the Metro rate zone, from \$7.07 to \$12.83 in the Suburban rate zone, and from \$11.40 to \$19.29 in the Rural rate zone.

¹⁵⁶ *Voices for Choices v. Illinois Bell Tel. Co.*, Case No. 03-C-3290, 22 (N.D. Ill. June 9, 2003) (granting preliminary injunction) (*Voices for Choices*).

¹⁵⁷ *Voices for Choices v. Illinois Bell Tel. Co.*, Case Nos. 03-2735 and 03-2766 (7th Cir. July 3, 2003).

item two in Illinois.¹⁵⁸ Specifically, the ACN Group argues that the loop rates promulgated by the Illinois Commission in response to the legislation are not TELRIC-compliant.¹⁵⁹ Although SBC has been enjoined from implementing the legislation, the ACN Group argues that the existence of the legislation and the pending court proceedings surrounding it result in rate uncertainty for competitive LECs.¹⁶⁰ To reduce uncertainty associated with the pending litigation of the legislation-based rates, SBC voluntarily has committed that, should it prevail in its challenge to the legislation injunction, it will not seek to true-up loop rates any higher than rates that would pass a benchmark comparison to loop rates in Texas that the Commission reviewed and approved in the *SWBT Texas Order* for the period from June 9, 2003 to the date we grant SBC's section 271 application in Illinois.¹⁶¹

42. The existence of pending litigation concerning SBC's loop rates in Illinois does not lead us to conclude that SBC's current Illinois loop rates fail to meet the requirements of checklist item two. As we have repeatedly held, we perform our section 271 analysis on the rates before us.¹⁶² If we find these rates to be TELRIC-compliant, then SBC has met its obligation to price UNEs in compliance with checklist item two. If, in the future, SBC were to raise those rates above the range that a reasonable application of TELRIC principles would produce, those rates could be challenged in district court or pursuant to section 271.¹⁶³ Section 271 provides a mechanism, section 271(d)(6)(B), to challenge any UNE rates as not being TELRIC-based.¹⁶⁴ Under section 271(d)(6)(A), the Commission has the authority to review any future SBC rate increases and, upon determining that such increases are not TELRIC-based in compliance with checklist item two, the Commission may suspend or revoke SBC's section 271 authority or impose other penalties.¹⁶⁵

43. With respect to the ACN Group's claim of rate confusion, we note that

¹⁵⁸ ACN Group Comments at 32-35.

¹⁵⁹ ACN Group Comments at 32.

¹⁶⁰ ACN Group Comments at 34.

¹⁶¹ SBC Reply at 54-55. See *SWBT Texas Order*, 15 FCC Rcd 18354.

¹⁶² See *Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Georgia and Louisiana*, CC Docket No. 02-35, Memorandum Opinion and Order, 17 FCC Rcd 9018, 9066-67, para. 97 (*BellSouth Georgia/Louisiana Order*) (citing *Verizon Rhode Island Order*, 17 FCC Rcd at 3317, para. 31).

¹⁶³ We note that SBC has stated, however, that in the event that it is permitted to raise its Illinois rates in the future, it will not do so above a level that would pass a benchmark comparison with the Texas UNE rates that the Commission reviewed and approved in the *SWBT Texas Order* for the period covering the 90-day 271 review period for Illinois. SBC Reply at 54-55.

¹⁶⁴ 47 U.S.C. § 271(d)(6)(B).

¹⁶⁵ 47 U.S.C. § 271(d)(6)(A).

competitors have more rate certainty in this instance than in the case of a pending state commission review of rates. In this case, the Illinois Commission already has completed its proceeding to establish loop rates in compliance with the legislation and competitors know what those rates will be. As noted above, if these loop rates ultimately are reinstated by a court and SBC seeks to true-up rates as of the day after grant of its section 271 authorization in Illinois, parties may challenge the rates pursuant to section 271(d)(6)(B).¹⁶⁶

44. *Interim Rates.* The ACN Group also argues that SBC does not demonstrate compliance with checklist item two in Illinois due to the existence of interim rates for dark fiber, subloops, and CNAM database queries.¹⁶⁷ In its section 271 proceeding, the Illinois Commission identified these rates as ones that it had not yet investigated, and set interim rates for these elements.¹⁶⁸ These interim rates are subject to true-up.¹⁶⁹ The Commission has held that:

the mere presence of interim rates will not generally threaten a section 271 application so long as an interim solution to a particular rate dispute is reasonable under the circumstances, the state commission has demonstrated its commitment to our pricing rules, and provision is made for refunds or true-ups once permanent rates are set.¹⁷⁰

We find that the interim rates identified by the ACN Group in Illinois meet this test. The Illinois Commission examined the interim rates and found them to be reasonable on an interim basis.¹⁷¹ The Illinois Commission has demonstrated a strong commitment to setting TELRIC-based rates in its many rate proceedings.¹⁷² These interim rates are subject to true-up, and the Illinois Commission is reviewing the rates in a pending proceeding.¹⁷³ The existence of these interim

¹⁶⁶ See *BellSouth Georgia/Louisiana Order*, 17 FCC Rcd at 9067-68, para. 98 ("Moreover, as we have pointed out in past section 271 proceedings, if 'prices are not set in accordance with our rules and the Act, we retain the ability going forward to take appropriate enforcement action, including action pursuant to section 271(d)(6)' (citing *Verizon Massachusetts Order*, 16 FCC Rcd at 9003, para. 30)).

¹⁶⁷ ACN Group Comments at 35-36. "CNAM" stands for caller ID with name.

¹⁶⁸ *Illinois Section 271 Phase I Order* at 177; *Illinois Section 271 Order* at 215.

¹⁶⁹ *Illinois Section 271 Phase I Order* at 177.

¹⁷⁰ *SWBT Texas Order*, 15 FCC Rcd at 18394, para. 88.

¹⁷¹ *Illinois Section 271 Order* at 215. Unlike the interim rates for EEL NRCs found by the Illinois Commission to be reasonable discussed in paras. 69-71, *infra*, we do not have specific concerns with the analysis used by the Illinois Commission to determine that these interim rates are reasonable.

¹⁷² See para. 5, *supra*.

¹⁷³ *Illinois Commerce Commission On Its Own Motion vs. Illinois Bell Telephone Company, Investigation of Dark Fiber, Subloops, and CNAM Database Query Rates of Illinois Bell Telephone Company*, ICC Docket No. 03-0231, Order (Illinois Commission Apr. 9, 2003). We also note that the rates that are interim are not UNE-P rates. See *Joint Application of SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the* (continued....)

rates does not, therefore, cause SBC to fail to demonstrate compliance with checklist item two in Illinois.

b. Indiana

(i) Background

45. SBC's current permanent Indiana rates for interconnection, UNEs and transport and termination of traffic are the result of multiple proceedings conducted by the Indiana Commission over a period of several years.¹⁷⁴ On December 18, 1996, pursuant to a request filed by Sprint, the Indiana Commission initiated an investigation and generic proceeding to review SBC's Indiana cost studies for its provision of interconnection, UNEs and transport and termination of traffic pursuant to sections 251 and 252 of the Act.¹⁷⁵ The generic proceeding consisted of three separate, but coordinated, dockets:¹⁷⁶ Cause No. 40611, in which the Indiana Commission mandated the application of TELRIC methodology in determining UNE pricing;¹⁷⁷ Cause No. 40611-S1 Phase I, in which the Indiana Commission considered issues that were not finalized in the *Indiana TELRIC Order*;¹⁷⁸ and Cause 40611-S1 Phase II, in which additional unresolved pricing issues were considered.¹⁷⁹ Over the course of the generic proceeding, the

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Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Arkansas and Missouri, CC Docket No. 01-194, Memorandum Opinion and Order, 16 FCC Rcd 20719, 20750, para. 64 (2001) (*SBC Arkansas/Missouri Order*).

¹⁷⁴ See SBC Application at 49; SBC Butler Aff. at para. 7; SBC Application App. A, Vol. 11, Tab 31, Affidavit of Thomas J. Makarewicz (SBC Makarewicz Aff.) at paras. 10-30.

¹⁷⁵ *Petition of Sprint Communications Company, L.P. for a Generic Proceeding on Ameritech's Rates for Interconnection, Unbundled Elements, Transport and Termination, and Resale*, Cause No. 40611 (Indiana Commission December 18, 1996).

¹⁷⁶ SBC Butler Aff. at paras. 67-69.

¹⁷⁷ *Commission Investigation and Generic Proceeding on Ameritech Indiana's Rates for Interconnection, Service, Unbundled Elements, and Transport and Termination under the Telecommunications Act of 1996 and Related Indiana Statutes*, Cause No. 40611 (Indiana Commission June 30, 1998) (*Indiana TELRIC Order*).

¹⁷⁸ *Commission Investigation and Generic Proceeding on Ameritech Indiana's Rates for Interconnection, Service, Unbundled Elements, and Transport and Termination under the Telecommunications Act of 1996 and Related Indiana Statutes*, Cause No. 40611-S1 (Indiana Commission March 28, 2002) (*Indiana Phase I Order*). This docket addressed the rate for unbundled local switching (ULS), including the port and usage costs, if any, the shared transport component of ULS and recurring and nonrecurring charges for all UNE combinations, including new installations when facilities are present but dial tone is not present, and migrations. See *Indiana Phase I Order* at 1-2.

¹⁷⁹ *Commission Investigation and Generic Proceeding on Ameritech Indiana's Rates for Interconnection, Service, Unbundled Elements, and Transport and Termination under the Telecommunications Act of 1996 and Related Indiana Statutes*, Cause No. 40611-S1 (Indiana Commission February 17, 2003) (*Indiana Phase II Order*). All of the remaining generic cost issues that had not been addressed in the *Indiana TELRIC Order* or *Indiana Phase I Order* were addressed in this docket. These included primary cost study assumptions for annual charge factors (ACFs), fill factors, and shared and common cost markup; access to the CNAM database; operator services/directory assistance (continued....)

Indiana Commission established SBC's wholesale prices based on either Indiana-specific TELRIC costs proposed by SBC as adjusted by the Indiana Commission, or proposals submitted by competitive LECs that were ordered for use in Indiana by the Indiana Commission.¹⁸⁰ Numerous competitive LECs and other parties participated in the generic proceeding.¹⁸¹ Subsequent to issuance of the *Indiana TELRIC Order*, SBC filed, on August 30, 1998, amended cost studies in compliance with that order.¹⁸² The rates required by the Indiana Commission in those proceedings are reflected in SBC's UNE and interconnection tariffs, and the rates are available for all new interconnection agreements.¹⁸³ Those rates also are made available for existing interconnection agreements if the language of the agreement provides for such adjustments.¹⁸⁴

46. On February 2, 2000, SBC sought review of its section 271 application by the Indiana Commission.¹⁸⁵ SBC requested and was approved to use a three-phase docket approach in evaluating its application.¹⁸⁶ Phase 2 of the proceeding involved pricing issues and was initiated on September 26, 2002, when SBC submitted its Checklist Informational Filing to the Indiana Commission. On October 31, 2002, however, the Indiana Commission issued a detailed process order that defined the minimum requirements for the Phase 2 investigation, including information submissions.¹⁸⁷ Consistent with that order, on November 18, 2002, SBC supplemented its Checklist Informational Filing by submitting a comprehensive report reflecting arbitration agreements and tariffs that it intended to use in support of its section 271 application and to demonstrate compliance with applicable statutes, and this Commission and Indiana

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(OS/DA) branding; subloop branding; DS-3 loops; loop conditioning; loop qualification; line sharing; line splitting; unbundling Project Pronto; 911 access; and dark fiber prices. See SBC Application App. D-IN, Vol. 2a, Tab 10, *Commission Investigation and Generic Proceeding on Ameritech Indiana's Rates for Interconnection, Service, Unbundled Elements, and Transport and Termination under the Telecommunications Act of 1996 and Related Indiana Statutes*, Cause No. 40611-S1 (Indiana Commission July 3, 2001) (listing the cost issues to be reviewed under Cause 40611-S1).

¹⁸⁰ See SBC Makarewicz Aff. at paras. 10-25.

¹⁸¹ Participants included AT&T, Sprint, MCI/WorldCom, Time Warner Communications of Indiana, the Indiana Office of Utility Consumer Counselor and numerous others. See SBC Makarewicz Aff. at para. 10.

¹⁸² SBC Makarewicz Aff. at para. 14.

¹⁸³ SBC Butler Aff. at para. 74.

¹⁸⁴ *Id.*

¹⁸⁵ See SBC Indiana Petition; see also *Indiana Compliance Order* at 1.

¹⁸⁶ *Id.*

¹⁸⁷ See *Petition of Indiana Bell Telephone Company, Incorporated, D/B/A Ameritech Indiana or SBC Indiana Pursuant to I.C. 8-1-2-61 For A Three-Phase Process For Commission Review of Various Submissions of SBC Indiana To Show Compliance With Section 271(C) of The Telecommunications Act of 1996*, Cause No. 41657 Process Order (Oct. 31, 2002) (*Indiana Process Order*).

Commission orders and rules.¹⁸⁸ Parties were given an opportunity to comment on SBC's Checklist Informational Filing and to discuss the checklist filings during workshops held April 2 and 3, 2003.¹⁸⁹

47. The price lists filed with the Indiana Commission by SBC in the section 271 docket reflect the approved rates set in the TELRIC proceedings.¹⁹⁰ After examining all of the filings in the docket, the Indiana Commission issued an order on July 2, 2003, indicating that it was prepared to support SBC's application, subject to the filing and implementation of the most recent versions of the same compliance plans that SBC had already agreed to implement in Michigan and Illinois.¹⁹¹ Based upon SBC's August 1, 2003, revised filing, the Indiana Commission concluded that SBC has complied with the *Indiana Compliance Order* and, therefore, conditionally supports SBC's section 271 application.¹⁹²

(ii) Discussion

48. *Rate Uncertainty.* The Indiana Commission expresses concern regarding SBC's ongoing challenges to its authority to require the filing of a UNE tariff.¹⁹³ Thus, the Indiana Commission qualifies its finding of SBC's compliance with section 271 upon a further determination by the Commission that such legal challenges do not result in uncertainty.¹⁹⁴ Similarly, the Indiana Office of Utility Consumer Counselor (IUCC) opposes SBC's section 271 application because SBC is appealing all of the Indiana Commission's UNE pricing orders,

¹⁸⁸ *Indiana Compliance Order* at 2.

¹⁸⁹ SBC Butler Aff. at para. 46.

¹⁹⁰ *Petition of Indiana Bell Telephone Company, Incorporated, D/B/A Ameritech Indiana or SBC Indiana Pursuant to I.C. 8-1-2-61 For A Three-Phase Process For Commission Review of Various Submissions of SBC Indiana To Show Compliance With Section 271(C) of The Telecommunications Act of 1996*, Cause No. 41657, "Section 271" Report and Recommendation of the Indiana Utility Regulatory Commission to the Federal Communications Commission, WC Docket No. 03-167 (Indiana Commission August 6, 2003) (*Indiana Section 271 Report and Recommendation*) at 194. See *Indiana Section 271 Report and Recommendation* at Attach. 3 for SBC's actual price lists submitted in support of its section 271 application.

¹⁹¹ See *Indiana Compliance Order* at Attach. One at 1.

¹⁹² Indiana Commission Comments at 3-5. We discuss the Indiana Commission's qualification in the discussion section below.

¹⁹³ Indiana Commission Comments at 3 and 4. Presently, SBC's lawsuit in Indiana, *Indiana Bell Tel Co. v. IURC*, Case No. IP01-0219-C-Y/S (S.D. Indiana filed Feb. 16, 2003), is pending before the court.

¹⁹⁴ *Id.* Here the Indiana Commission states: "SBC Indiana satisfies Section 271(c)(1)(A) of the Telecommunications Act of 1996, to the extent the FCC determines that the uncertainty caused by SBC's challenges to our legal authority to order it to file a UNE tariff does not constitute or cause a lack of a 'concrete and specific legal obligation [by SBC] to furnish the item upon request pursuant to state-approved interconnection agreements that set forth prices and other terms and conditions for each checklist item' for certain UNEs and rate elements."

thereby constituting "continued uncertainty" for UNE rates in SBC's Indiana service territory.¹⁹⁵ Thus, even though the Indiana Commission has reviewed and set TELRIC-compliant rates for SBC, commenters express concern regarding the uncertainty of future rates that SBC might impose on competitive LECs if SBC prevails in its various court appeals.

49. In response to the comments, SBC argues that its challenges of the Indiana Commission's tariff and pricing orders should not preclude a determination that it is in compliance with section 271.¹⁹⁶ SBC characterizes its appeals as intended to preserve the viability of the legal obligations contained in its interconnection agreements.¹⁹⁷ SBC has committed that, if it is successful in its appeals, it will not initiate any action seeking retroactive application or payments from competitive LECs for interconnection services or UNEs.¹⁹⁸ SBC also notes that the IUCC, while complaining of possible rate uncertainty, does not challenge the correctness of current rates, nor of SBC's compliance with the Indiana Commission's pricing orders. SBC also has expressed its intent, during the pendency of the appeals, to continue complying with the Indiana Commission's tariff and pricing orders absent a stay, modification, or reversal.¹⁹⁹

50. In prior section 271 decisions, we determined that future rate uncertainty due to a pending appeal, without more, should not affect our review of the currently effective rates submitted with a section 271 application.²⁰⁰ In the *Qwest Minnesota Order*, we rejected AT&T's

¹⁹⁵ IUCC Comments at 15-16. In addition to challenging the Indiana Commission's authority to require a tariff, SBC has several pending appeals challenging the validity of the pricing methodology. These include: *Indiana Bell Tel. Co. v. McCarty*, Case No. IP02-C-0656-B/S (S.D. Indiana filed April 29, 2002) challenging the methodology set for NRCs and UNE combinations and other rates; and *Indiana Bell Tel. Co. v. McCarty*, Case Nos. 03-1122, 03-1123 & 03-1124 (7th Cir. Filed Jan. 16, 2003), on issues concerning the obligation to offer new UNE combinations, and OS/DA and dark fiber as a UNE. See SBC Butler Aff. at paras. 61-62.

¹⁹⁶ SBC Application Reply App., Vol. 2a, Tab 4, Reply Affidavit of Jolynn B. Butler (SBC Butler Reply Aff.) at para. 3-4.

¹⁹⁷ SBC Reply at 63-64. Here SBC characterizes the Indiana Commission's tariff requirement as being intended to provide competitive LECs the option of purchasing UNEs and interconnection terms "off-the-shelf" rather than through an interconnection agreement; an option that SBC apparently opposes.

¹⁹⁸ SBC September 9 *Ex Parte* Letter at Attach. J. To reduce uncertainty associated with its pending appeals, SBC committed that, subsequent to a favorable court decision, it will not initiate retroactive application of the decision in its favor. Should another party initiate retroactive application of the elements of the decision in that party's favor, however, SBC reserves its rights to seek retroactive application of the portions of the decision in SBC's favor. *Id.*, Attach. J at 2.

¹⁹⁹ See SBC Application App. C Vol. 9, Tab 62, *SBC Indiana's Response to April 28, 2003 Comments* at 17.

²⁰⁰ *Qwest Minnesota Order*, 18 FCC Rcd at 13349, para. 49; *Qwest Nine State Order*, 17 FCC Rcd at 26469, paras. 306-307 (wherein the Commission rejects the notion that a pending state commission review of TELRIC-compliant UNE rates in Utah should result in the denial of a section 271 application); *Application by Verizon Maryland Inc., Verizon Washington, D.C. Inc., Verizon West Virginia Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks Inc., and Verizon Select Services Inc., for Authorization To Provide In-Region, InterLATA Services in Maryland*, (continued....)

argument that a section 271 application should be denied solely because an applicant is appealing TELRIC-compliant UNE rates, while at the same time basing its section 271 application on the very rates it is appealing. In that case, as in this one, the Commission based its determination on the merits of the applicant's present rates.²⁰¹ The mere existence of the possibility that TELRIC-compliant UNE rates might be amended in the future, in and of itself, is not justification for denying a section 271 application. We conclude that SBC's pending appeals before the state and federal courts do not preclude us from finding that SBC satisfies checklist item two.

c. Ohio

(i) Background

51. The Ohio Commission opened a proceeding to review SBC Ohio's costs and rates for interconnection and UNEs on September 3, 1996,²⁰² shortly after the release of the *Local Competition Order*.²⁰³ Competitive LECs and other interested parties, including AT&T, MCI, Sprint, Time Warner, CompTel, the Ohio Cable Telecommunications Association, and the Ohio Consumers' Counsel, participated in the proceeding. On the basis of a voluminous record that included cost studies, computer models, testimony about TELRIC methodology, thirty-three days of hearings, and the cross-examination of witnesses, the Ohio Commission on June 19, 1997, established the methodology and inputs to be used for cost studies that underlie UNE pricing.²⁰⁴

52. In the course of its evaluation and findings, the Ohio Commission consistently

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Washington, D.C., and West Virginia, WC Docket No. 02-384, Memorandum and Order, 18 FCC Rcd 5212, 5311, para. 170 (2003) (*Verizon DC/MD/WVA Order*) (involving a rejection by the Commission of commenters' contention that Verizon's pending appeal of UNE rates should result in the rejection of its section 271 application); Application by Verizon New England Inc., Verizon Delaware Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks Inc., and Verizon Select Services Inc., for Authorization to Provide In-Region, InterLATA Services in New Hampshire and Delaware, WC Docket No. 02-157, Memorandum and Order, 17 FCC Rcd 18660, 18735, paras. 130-131 (2002) (*Verizon New Hampshire/Delaware Order*) (wherein the Commission rejects a commenter's argument that a section 271 application should fail on the basis that the applicant is appealing TELRIC-compliant collocation power rates to the state supreme court, citing the *SWBT Texas Order*, 15 FCC at 18394, para. 87).

²⁰¹ *Qwest Minnesota Order*, 18 FCC Rcd at 13349, para. 49.

²⁰² *Review of Ameritech Ohio's Economic Costs of Interconnection, Unbundled Network Elements, and Reciprocal Compensation for Transport and Termination of Local Telecommunications Traffic*, Memorandum, Case No. 96-922-TP-UNC (Ohio Commission Sept. 3, 1996).

²⁰³ See, generally, *Local Competition Order*, 11 FCC Rcd 15499.

²⁰⁴ *Review of Ameritech Ohio's Economic Costs of Interconnection, Unbundled Network Elements, and Reciprocal Compensation for Transport and Termination of Local Telecommunications Traffic, Application of Ameritech Ohio to Revise its Ameritech Tariff, P.U.C.O. No. 20, to Introduce Unbundled Network Components, Petition of Ameritech Ohio for Approval of a Statement of Generally Available Terms and Conditions Pursuant to the Telecommunications Act of 1996*, Opinion and Order, Case Nos. 96-922-TP-UNC, 96-974-TP-ATA, 96-1057-TP-UNC (Ohio Commission June 19, 1997) (*Ohio Commission UNE Order*).

demonstrated its commitment to TELRIC principles.²⁰⁵ It used the Ameritech Facility Analysis Model to compute the capital investment required to construct loop facilities and the Switching Cost Information System for the switching cost model, but made numerous modifications to SBC's proposed cost study assumptions based on the evidence submitted by competitive LECs.²⁰⁶

The Ohio Commission ordered the use of FCC-prescribed depreciation lives and a 9.74 percent cost of capital, and made other determinations with respect to fill factors, shared and common cost factors, non-recurring charges, switching, loops, and collocation.²⁰⁷ SBC's cost studies for unbundled loops were geographically deaveraged based on three geographic zones or access areas, reflecting cost differences for each zone.²⁰⁸ Following a period for rehearing, various parties entered into a stipulation, additional issues were resolved, and on the basis of revised cost studies, SBC filed UNE rates on June 9, 1999, in compliance with Ohio Commission orders.²⁰⁹

53. The Ohio Commission used the same docket on an ongoing basis to establish rates for other UNEs and interconnection services as well. For example, on October 4, 2001, the Ohio Commission determined the scope and pricing of UNE-platform and its related non-recurring charge.²¹⁰ More recently, it issued an order on March 13, 2003, regarding loop conditioning, loop qualification, and shared cage and cageless collocation.²¹¹ SBC presently has a proceeding before

²⁰⁵ See, e.g., *Ohio Commission UNE Order* at 10, 11, 24, 30, 44, 86.

²⁰⁶ SBC Application App. A Vol. 3, Tab 12, Affidavit of Dr. Kent A. Currie at A-5 (SBC Currie Aff.). See also, generally, *Ohio Commission UNE Order*.

²⁰⁷ *Ohio Commission UNE Order* at 8-11, 22, 28-29, 48-49, 53-58, 61-82.

²⁰⁸ *Ohio Commission UNE Order* at 65; SBC Currie Aff. at para. 47.

²⁰⁹ SBC Application App. D-OH, Vol. 9, Tab 99-100, *Review of Ameritech Ohio's Economic Costs of Interconnection, Unbundled Network Elements, and Reciprocal Compensation for Transport and Termination of Local Telecommunications Traffic*, Letter, Case No. 96-922-TP-UNC (Ohio Commission May 27, 1999). SBC Application App. D-OH, Vol. 9, Tab 101, Letter from Susan Drombetta, SBC, to Daisy Crockron, Chief of the Docketing Division, Case No. 96-922-TP-UNC (Ohio Commission June 9, 1999).

²¹⁰ *Review of Ameritech Ohio's Economic Costs of Interconnection, Unbundled Network Elements, and Reciprocal Compensation for Transport and Termination of Local Telecommunications Traffic, Application of Ameritech Ohio for Approval of Carrier to Carrier Tariff*, Opinion and Order, Case Nos. 96-922-TP-UNC, 00-1368-TP-ATA (Ohio Commission Oct. 4, 2001); see also *Review of Ameritech Ohio's Economic Costs of Interconnection, Unbundled Network Elements, and Reciprocal Compensation for Transport and Termination of Local Telecommunications Traffic, Application of Ameritech Ohio for Approval of Carrier to Carrier Tariff*, Entry on Rehearing, Case Nos. 96-922-TP-UNC, 00-1368-TP-ATA at 32 (Ohio Commission Jan. 31, 2002) (affirming and stating that although the Ohio Commission does not rely on a survey by Commerce Capital Markets for its decision, "[i]t is worthwhile to note that a review of the survey dated November 12, 2001...demonstrates that Ohio has the lowest rates nationwide for unbundled loop, per minute local switching, and considering the \$0.74 non-recurring charge, the UNE-P offering.").

²¹¹ *Review of Ameritech Ohio's Economic Costs of Interconnection, Unbundled Network Elements, and Reciprocal Compensation for Transport and Termination of Local Telecommunications Traffic*, Opinion and Order, Case Nos. 96-922-TP-UNC, 00-1368-TP-ATA (Ohio Commission March 13, 2003). Loop qualification information allows competitive LECs to determine if a loop is suitable for Digital Subscriber Line (DSL) service. Loop conditioning is (continued....)

the Ohio Commission to update prices for unbundled loops and other UNEs related to the UNE-platform based on new 2002 cost studies that update the original 1996 studies.²¹² The Ohio Commission has recommended that SBC's section 271 application be approved after finding that the carrier's UNE "rates are reasonable and consistent with the FCC's and the [Ohio Commission's] TELRIC-based pricing methodology."²¹³

(ii) Discussion

54. The Ohio Consumers' Counsel (OCC) contends that SBC's section 271 application should be conditioned on the continued affordability of the UNE-platform because this is so vital to ongoing competition.²¹⁴ More specifically, the OCC criticizes SBC for seeking UNE rate increases soon after these rates were approved and cites the pending Ohio UNE proceeding as an example.²¹⁵ The OCC also asserts that since there is no "requirement that SBC continue the UNE-P at present rates," SBC's section 271 application should be rejected as not being in the public interest.²¹⁶

55. We disagree. The OCC's allegations do not support a finding that SBC's proposed UNE rate increase in Ohio or other states constitutes a checklist item two violation or that SBC fails to meet its public interest requirements.²¹⁷ As we have consistently concluded,

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sometimes necessary to make a loop that carries voice traffic capable of providing high speed data traffic, also known as a DSL-capable line.

²¹² *Review of Ameritech Ohio's TELRIC Costs for Unbundled Network Elements*, SBC Ameritech Ohio's Application for Approval of Unbundled Network Element Prices, Case No. 02-1280-TP-UNC (Ohio Commission May 31, 2002).

²¹³ *Ohio Commission 271 Order* at 134.

²¹⁴ OCC Comments at 2.

²¹⁵ OCC Comments at 4. The OCC notes that it specifically addresses SBC's section 271 application in Ohio and then asserts that many of the principles it raises apply to the other three states in this section 271 application. OCC Reply at n.1. As a result, we address this complaint specifically to Ohio in this section of our order but also take into account the other states in our analysis and conclusion. The OCC specifically refers to legislation in Illinois that would have increased UNE rates but was stayed by the court. OCC Comments at 3 n.8. This issue is discussed in Part IV.B.1.a.(ii), *supra*.

²¹⁶ OCC Comments at 5. Although OCC characterizes this as a public interest issue, a basis for OCC's complaint is that SBC has proposed to increase the UNE rates that SBC relies on for approval of its section 271 application. This issue was raised in the context of checklist item 2 in previous section 271 proceedings. As a result, we analyze OCC's allegation in this part of our order from both a public interest and checklist item 2 standpoint.

²¹⁷ We noted above that the OCC also refers to Illinois legislation, which is further discussed in Part IV.B.1.a.(ii), *supra*, and only generally to other states. OCC Comments at 3-5. The Commission must make a separate determination that approval of a section 271 application is "consistent with the public interest, convenience, and necessity," but it may neither limit nor extend the terms of the competitive checklist of section 271(c)(2)(B). 47 U.S.C. §§ 271(d)(3)(C), (d)(4). Thus, the Commission views the public interest requirement as an opportunity to review the circumstances presented by the application to ensure that no other relevant factors exist that would (continued....)

where the incumbent LEC has filed a section 271 application while pursuing a UNE rate increase in a pending state proceeding, we perform our analysis on the rates before us—the rates the LEC submitted in its section 271 application.²¹⁸ If we find SBC's currently available UNE rates in a state to be TELRIC-compliant, SBC has met its obligation to set UNE-platform rates in compliance with checklist item two.

56. We note that the OCC raised this issue in the state's section 271 proceeding, but the Ohio Commission rejected it.²¹⁹ Furthermore, we note that in SBC's pending UNE proceeding before the Ohio Commission, SBC asserts that its proposed UNE rate increase is based on its updating of cost studies and experience in providing UNEs to competitors over the past five years.²²⁰ We believe that the public interest is well served where, as here, rates are timely reviewed in light of rapid changes in technology, the regulatory environment or market conditions.²²¹

57. Indeed, a UNE rate freeze, rather than acting to remove a barrier to competitive entry, may pose a barrier to compliance with the Act itself. Under the Act, state commissions have a duty to set cost-based rates for UNEs, and we recognize that there may be factors that cause costs to change over time. This is precisely why state commissions devote the time and resources necessary to hold hearings to update rates, either upward or downward as necessary, based on consideration of all new information and relevant data brought before them. The U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) also has agreed that "rates may often need adjustment to reflect newly discovered information."²²² Moreover, the D.C. Circuit has made clear that we may rely upon state commissions to set UNE rates.²²³

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frustrate the congressional intent that markets be open, as required by the competitive checklist, and that entry will serve the public interest as Congress expected.

²¹⁸ *Application by Qwest Communications International, Inc., for Authorization To Provide In-Region, InterLATA Services in New Mexico, Oregon and South Dakota*, Memorandum Opinion and Order, WC Docket No. 03-11, 18 FCC Rcd 7325, 7372, paras. 83-84 (7-10-03) (*Qwest Three State Order*); *Qwest Nine State Order*, 17 FCC Rcd at 26469-70, para. 307; *BellSouth Georgia/Louisiana Order*, 17 FCC Rcd at 9066-67, para. 97 (citing *Verizon Rhode Island Order*, 17 FCC Rcd at 3317, para. 31).

²¹⁹ *Ohio Commission 271 Order* at 4, 6-7. "The [Ohio] Commission does not see the need . . . to tie our recommendation to a specific requirement regarding SBC Ohio's current or proposed UNE-P rates." *Id.* at 7. The Ohio Commission recommended that the FCC approve SBC Ohio's section 271 application. *Id.* at 1. The Wisconsin Commission also rejected a UNE rate freeze proposed by competitive LECs on public interest grounds, finding that this is contrary to the Act and state law. *Wisconsin 271 Phase I Order* at 30, 280.

²²⁰ *Review of Ameritech Ohio's TELRIC Costs for Unbundled Network Elements*, SBC Ameritech Ohio's Application for Approval of Unbundled Network Element Prices, Case No. 02-1280-TP-UNC at 4 (Ohio Commission May 31, 2002).

²²¹ See, e.g., *Bell Atlantic New York Order*, 15 FCC Rcd at 4085-86, para. 247.

²²² *AT&T Corp. v. FCC*, 220 F.3d at 617 (D.C. Cir. 2000).

²²³ *WorldCom v. FCC*, 308 F.3d 1, 8 (D.C. Cir. 2002).

58. We also find OCC's allegations too speculative to consider because they require us to speculate as to what rates the Ohio Commission ultimately may adopt, and we have no basis to assume such rates would be inconsistent with TELRIC principles. In fact, the OCC itself points out that "[m]any of the public service commissions in the former Ameritech states conducted painstaking reviews of SBC costs for the UNE-P and arrived at cost-based rates that have helped spur local service competition in their states."²²⁴ This demonstrated commitment to setting UNE rates at TELRIC levels only adds to our confidence that the Ohio Commission will modify rates appropriately in the future based on the evidence before it.²²⁵

59. The OCC has not demonstrated that the lack of a requirement to freeze UNE-platform rates for a period of time poses a barrier to competitive entry, and we can find no public interest violation.²²⁶ Additionally, we note that section 271(d)(6)(B) of the Act provides a mechanism for an interested party to challenge any UNE rates as not being TELRIC-based following the grant of section 271 authority.²²⁷ Under section 271(d)(6)(A), the Commission has the authority to review any future SBC rate increase, including the one now pending in Ohio. Should we determine that any such increase is not TELRIC-based in compliance with checklist item two, section 271(d)(6)(A) empowers the Commission to suspend or revoke SBC's section 271 authority or impose other penalties.²²⁸

d. Wisconsin

60. The Wisconsin Commission initially established SBC's UNE rates in two proceedings in 1996-97.²²⁹ The state commission in 1999 then opened a new docket to review the UNEs that SBC was required to offer and their costs.²³⁰ Extensive testimony was filed and

²²⁴ OCC Comments at 4.

²²⁵ This conclusion applies to the other state commissions as well.

²²⁶ The Commission must make a separate determination that approval of a section 271 application is "consistent with the public interest, convenience, and necessity," but it may neither limit nor extend the terms of the competitive checklist of section 271(c)(2)(B). 47 U.S.C. §§ 271(d)(3)(C), (d)(4). Thus, the Commission views the public interest requirement as an opportunity to review the circumstances presented by the application to ensure that no other relevant factors exist that would frustrate the congressional intent that markets be open, as required by the competitive checklist, and that entry will serve the public interest as Congress expected.

²²⁷ 47 U.S.C. § 271(d)(6)(B).

²²⁸ 47 U.S.C. § 271(d)(6)(A).

²²⁹ *Investigation of the Appropriate Standards to Promote Effective Competition in the Local Exchange Telecommunications Market in Wisconsin*, Findings of Fact, Conclusions of Law, and First Final Order, Docket No. 05-TI-138 (Wisconsin Commission July 2, 1996). *Matters Relating to Satisfaction of Conditions for Offering InterLATA Service (Wisconsin Bell, Inc. d/b/a Ameritech Wisconsin)*, Findings of Fact, Conclusions of Law, and Second Order, Docket No. 6720-TI-120 (Wisconsin Commission May 29, 1997).

²³⁰ *Investigation Into Ameritech Wisconsin's Unbundled Network Elements*, Notice of Proceeding, Docket No. 6720-TI-161 (Wisconsin Commission Dec. 15, 1999).

numerous parties participated in hearings, including AT&T, Covad, KMC Telecom, McCleod, MCI, Rhythm Links, Time Warner, and the Wisconsin Department of Justice. Parties had the opportunity to cross-examine witnesses in seven days of hearings. The Wisconsin Commission concluded this proceeding in 2002 and comprehensively addressed the availability of UNEs and the methodology for SBC in setting UNE rates.²³¹

61. The Wisconsin Commission used Ameritech's Loop Facility Analysis Model to compute the capital investment required to construct loop facilities and the Ameritech Regional Partners in Provisioning Switching Model for determining switching costs, but made many adjustments and modifications to the inputs and assumptions proposed by SBC.²³² Among its determinations, the Wisconsin Commission established cost inputs for cost of capital,²³³ switching,²³⁴ fill factors,²³⁵ depreciation,²³⁶ non-recurring costs,²³⁷ and collocation.²³⁸ Further, the Wisconsin Commission on July 9, 2003, determined that, except for certain issues that required additional evaluation, SBC had filed revised cost studies that comply with the state commission's requirements for setting rates.²³⁹ In a separate proceeding, the Wisconsin Commission established three defined geographic areas that reflect cost differences for each area and were

²³¹ *Investigation Into Ameritech Wisconsin's Unbundled Network Elements*, Final Decision, Docket No. 6720-TI-161 at 22-25 (Wisconsin Commission Mar. 22, 2002) (*Wisconsin Commission UNE Order*). "[A]pplying TELRIC . . . is also consistent with the Wisconsin definition of total service long incremental costs (TSLRIC), which is a pricing method similar to TELRIC." *Id.* at 24. "While all parties agree that TELRIC is the pricing standard to apply, the parties have differing interpretations as to the proper implementation [of TELRIC]." *Id.* at 25.

²³² SBC Application App. A, Vol. 11, Tab 36, Affidavit of Barbara A. Smith Regarding Wisconsin, Attach. A-4 (SBC Smith Wisconsin Aff.). See also *Wisconsin Commission UNE Order* at 134.

²³³ *Wisconsin UNE Order* at 3. The Wisconsin Commission found 13% return on equity and 7.18% cost of debt to be reasonable, and adjusted the capital structure proposals of its staff and SBC. *Id.*

²³⁴ *Id.* at 7-9; 73-83. Competitive LECs did not challenge the calculations in SBC's switching models, the ARPSM (Ameritech Regional Partners in Provisioning Switching Model) and NUCAT (Network Usage Cost Analysis Tool), but disagreed with SBC's inputs and assumptions. *Id.* at 73. The Wisconsin Commission was "reluctant to go against the traditional rate structure for unbundled switching" that included a usage rate, but found "compelling policy reasons" to set a flat per-line rate; it based the shared transport per-minute charge on an estimate of the average distance a call will be transported. *Id.* at 83-84.

²³⁵ *Id.* at 14. The Wisconsin Commission found it was "reasonable to use [competitive] LECs' fill factors in determining unbundled loop costs." *Id.*

²³⁶ *Id.* at 15, 153-54.

²³⁷ *Id.* at 166-185. The Wisconsin Commission found it was easier to incorporate its adjustments into the SBC model for non-recurring costs. *Id.* at 185.

²³⁸ *Id.* at 4-32; 40-67. The Wisconsin Commission found that its adjustments would "be best implemented by using the [competitive] LECs' Collocation Cost Model (CCM)." *Id.* at 67.

²³⁹ *Investigation Into Ameritech Wisconsin's Unbundled Network Elements*, UNE Compliance Order, Docket No. 6720-TI-161 (Wisconsin Commission July 9, 2003) (*Wisconsin UNE Compliance Order*).

used to deaverage UNE loop rates.²⁴⁰ The Wisconsin Commission has determined that SBC offers its competitors nondiscriminatory access to UNEs as required by the Act and supports SBC's section 271 application.²⁴¹

62. No party raises any issues specific to UNE rates in Wisconsin alone. Challenges to rates that affect Wisconsin in addition to the other states at issue in this proceeding are addressed below.

e. Other Issues

(i) EEL NRCs

63. *Background.* Globalcom argues that SBC has failed to demonstrate compliance with checklist item two because its non-recurring charges (NRCs) for enhanced extended links (EELs) in Illinois and Wisconsin are not TELRIC-based.²⁴² Globalcom asserts that in Illinois SBC charges NRCs of \$2,285.85 for a 4-wire DS1 digital loop to DS1 dedicated transport combination for an uncollocated customer.²⁴³ According to Globalcom, these NRCs are outside the range that a reasonable application of TELRIC would produce, are over 13 times the NRCs of \$173 applied for the same EEL combination in California, and are over 240 percent of the NRCs SBC recently proposed in an Illinois cost proceeding.²⁴⁴ In December 2002, SBC tariffed new recurring and non-recurring UNE rates, and the Illinois Commission suspended the rates pending an investigation.²⁴⁵ The NRCs filed by SBC in that tariff submission for the 4-wire DS1 digital loop to DS1 dedicated transport combination (non-collocated) were \$932.06.²⁴⁶ The Illinois Commission's tariff investigation was abated by section 13-408(c) of the Illinois Public Utilities Act on May 9, 2003.²⁴⁷ Globalcom also alleges that SBC's EEL NRCs in Illinois violate section 271's public interest standard by precluding competitive entry.²⁴⁸

²⁴⁰ *Investigation into the Establishment of Cost-Related Zones for Unbundled Network Elements*, Order, Docket No. 05-TI-349 (Wisconsin Commission Jan. 17, 2003).

²⁴¹ *See, generally, Wisconsin 271 Phase II Order.*

²⁴² Globalcom Comments at 4-14.

²⁴³ Globalcom Comments at 2.

²⁴⁴ Globalcom Comments at 2.

²⁴⁵ Globalcom Comments at 12 and Tab 3 (Letter from Rhonda Johnson, Vice President Illinois Regulatory, SBC, to Illinois Commerce Commission, Advice No. IL-02-1637 (Dec. 24, 2002)) (*SBC Dec. 24, 2002 Tariff Filing*).

²⁴⁶ Globalcom Comments at Tab 3 (*SBC Dec. 24, 2002 Tariff Filing*, Ill. C.C. Tariff No. 20, Part 19, Section 20, 1st Revised Sheet No. 6.6).

²⁴⁷ 22 Ill. Comp. Stat. 5/13-408(c).

²⁴⁸ Globalcom Comments at 23-24.

64. In its proceeding investigating SBC's compliance with the requirements of section 271, the Illinois Commission identified several rates as interim, including NRCs for UNE combinations, such as EELs.²⁴⁹ In Phase I of the section 271 proceeding, the Illinois Commission made these interim rates subject to true up.²⁵⁰ In Phase II of the section 271 proceeding, the Illinois Commission assessed the reasonableness of SBC's interim EEL NRCs by comparing the combined EEL NRCs and EEL recurring rates of SBC in Illinois to the combined rates in California, Texas and Michigan.²⁵¹ The Illinois Commission also examined the Commission's universal service fund (USF) cost model to compare relative cost differences between the four states.²⁵² Based on this analysis, the Illinois Commission found that SBC's combined EEL NRCs and recurring charges in Illinois were reasonable when compared to the combined EEL charges in California.²⁵³ The Illinois Commission found that, although SBC's Illinois interim EEL NRCs were at the upper end of any zone of reasonableness, 1) the commission had found these rates to be reasonable as interim rates in another UNE proceeding,²⁵⁴ and 2) the commission was currently investigating the interim EEL NRCs.²⁵⁵

65. In its reply, SBC defends its \$2,285 EEL NRCs as TELRIC-compliant, but also offers to amend Globalcom's interconnection agreement to include the lower EEL NRCs it had proposed in the abated tariff investigation proceeding.²⁵⁶ According to SBC, upon approval of the amended interconnection agreement, these EEL NRCs would be available to all other carriers in Illinois on an opt-in basis, or alternatively SBC will offer the same rates to any interested competitive LEC in Illinois.²⁵⁷ These NRCs and the tariffed \$2,285 NRCs would be interim subject to true-up to February 6, 2003, after the Illinois Commission concludes an investigation

²⁴⁹ *Illinois Section 271 Phase I Order* at 170.

²⁵⁰ *Illinois Section 271 Phase I Order* at 177.

²⁵¹ *Illinois Section 271 Order* at 206.

²⁵² *Illinois Section 271 Order* at 206.

²⁵³ *Illinois Section 271 Order* at 206. The Illinois Commission found that SBC's Illinois EEL rates were high when compared to the rates in Texas and Michigan under this analysis. *Id.*

²⁵⁴ See *Illinois Commerce Commission on its Own Motion Investigation into the Compliance of Illinois Bell Telephone Company with the Order in Docket 96-0486/0569 Consolidated Regarding the Filing of Tariffs and the Accompanying Cost Studies for Interconnection, Unbundled Network Elements and Local Transport and Termination and Regarding End To End Bundling Issues*, ICC Docket No. 98-0396, Order on Reopening (Illinois Commission Apr. 30, 2002) (adopting these rates as interim NRCs for UNE-P and special access-to-EEL conversions).

²⁵⁵ *Illinois Section 271 Order* at 206-207.

²⁵⁶ SBC Reply at 62, SBC Application Reply App., Vol. 3, Tab 13, Reply Affidavit of W. Karl Wardin (SBC Wardin Reply Aff.) at para. 40.

²⁵⁷ SBC Wardin Reply Aff. at para. 40.

into the charges.²⁵⁸

66. *Complete-As-Filed Waiver.* We waive the complete-as-filed requirement on our own motion pursuant to section 1.3 of the Commission's rules to the limited extent necessary to consider SBC's revised EEL NRCs.²⁵⁹ The Commission maintains certain procedural requirements governing section 271 applications.²⁶⁰ In particular, the "complete-as-filed" requirement provides that when an applicant files new information after the comment date, the Commission reserves the right to start the 90-day review period again or to accord such information no weight in determining section 271 compliance.²⁶¹ We maintain this requirement to afford interested parties a fair opportunity to comment on the BOC's application, to ensure that the Attorney General and the state commission can fulfill their statutory consultative roles, and to afford the Commission adequate time to evaluate the record.²⁶² The Commission can waive its procedural rules, however, "if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest."²⁶³

67. We find that a waiver is appropriate in these circumstances. SBC's offering of lower EEL NRCs constitutes a change in its rates subsequent to the filing of its application.²⁶⁴ In prior cases the Commission has found cause to grant a waiver of the complete-as-filed rule where the rate changes are responsive to criticisms on the record, as compared to new information that "consists of additional arguments or information" concerning current pricing.²⁶⁵ The rate reductions made by SBC in this case satisfy this standard. The changes were responsive to arguments raised in the record of this proceeding, and the rate reductions provide a pro-competitive response to commenters' stated concerns.²⁶⁶ The newly-available interim EEL NRCs are the rates proposed by SBC in a tariff investigation proceeding, and therefore these rates are likely to be the maximum rates that could be adopted by the Illinois Commission when it sets

²⁵⁸ SBC Wardin Reply Aff. at para. 40.

²⁵⁹ 47 C.F.R. § 1.3.

²⁶⁰ See *Updated 271 Filing Requirements Public Notice*.

²⁶¹ *Verizon Rhode Island Order*, 17 FCC Rcd at 3306-06, para. 7 (2002); *SWBT Kansas/Oklahoma Order*, 16 FCC Rcd at 6247, para. 21.

²⁶² *Verizon Rhode Island Order*, 17 FCC Rcd at 3306, para. 7; *Ameritech Michigan Order*, 12 FCC Rcd at 20572-73, paras. 52-54.

²⁶³ *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d at 1166; *WAIT Radio v. FCC*, 418 F.2d 1153. See also 47 U.S.C. § 154(j); 47 C.F.R. § 1.3.

²⁶⁴ See SBC Reply at 62; SBC Wardin Reply Aff. at paras. 40-41 (setting forth SBC's offer to make available to Globalcom or any other interested competitive LEC its previously tariffed EEL NRCs).

²⁶⁵ *Verizon Rhode Island Order* 17 FCC Rcd at 3308-09, para. 12; *Qwest Nine State Order*, 17 FCC Rcd at 26409-10, para. 180.

²⁶⁶ See Globalcom Comments at 2, 12-13.

permanent EEL NRCs. We find that it is fully consistent with our precedent under section 271 to consider the type of responsive information without requiring the BOC to make a new filing.

68. Another major concern that we have identified in prior cases where rates have changed during a proceeding is that interested parties be afforded a sufficient opportunity to review the new rates, and that the analytical burden of doing so is not too great in light of the time constraints inherent in the section 271 application process.²⁶⁷ Although SBC did not provide notice of this rate change until it filed its reply comments on day 43 of the 90-day statutory period, in prior cases we have considered rate reductions made much later in the 90-day application cycle.²⁶⁸ We also find no undue burden associated with analyzing the new rates. Globalcom provided an analysis of the new rates in its comments, which were filed on day 20 of the application period.²⁶⁹

69. *Discussion.* Although we have concerns about the method used by the Illinois Commission to determine that the interim EEL NRCs are reasonable,²⁷⁰ we find that the revised EEL NRCs that SBC has committed to provide to competitive LECs in interconnection agreements are reasonable interim rates. These rates fall within the range of EEL NRCs SBC charges in its other states.²⁷¹ We expect that the Illinois Commission, which has demonstrated a strong commitment to setting TELRIC-based rates in its many rate proceedings, will review the interim EEL NRCs in the near future. The interim EEL NRCs will then be subject to true up back to February 6, 2003. We also find that the availability of the lower EEL NRC to competitors adequately addresses Globalcom's concern that the \$2,285 EEL NRC impedes competitive entry.

²⁶⁷ *Verizon Rhode Island Order*, 17 FCC Rcd at 3308, paras. 10-11.

²⁶⁸ See, e.g., *Verizon Rhode Island Order*, 17 FCC Rcd at 3306-10, paras. 8-17 (considering changes in rates filed on day 80 of the application); *SWBT Kansas/Oklahoma Order*, 16 FCC Rcd at 6247-49, paras. 22-26 (considering changes in rates filed on day 63 of the application); *Verizon New Hampshire/Delaware Order* 17 FCC Rcd at 18666-67, para. 11 (considering changes in rates filed on day 64 of the application); *Application by SBC Communications Inc., Pacific Bell Telephone Company, and Southwestern Bell Communications Services Inc., for Authorization to Provide In-Region, InterLATA Services in California*, WC Docket No. 02-306, Memorandum Opinion and Order, 17 FCC Rcd 25650, 25663-65, paras. 26-31 (2002) (*SBC California Order*) (considering changes in rates filed on day 45 of the application).

²⁶⁹ Globalcom Comments at Tab 3 (*SBC Dec. 24, 2002 Tariff Filing*, Ill. C.C. Tariff No. 20, Part 19, Section 20, 1st Revised Sheet No. 6.6).

²⁷⁰ In its reply SBC asserts that Commission precedent supports its position that it is reasonable to aggregate NRCs with recurring charges to determine their reasonableness. SBC Reply at 59-60. SBC is incorrect. Although the Commission aggregates recurring non-loop charges in conducting its benchmark analysis, the Commission has never allowed applicants to aggregate recurring charges with NRCs to demonstrate compliance with TELRIC. See, e.g., *Verizon New Jersey Order*, 17 FCC Rcd at 12302-12305, paras. 61-68 (examining Verizon's NRCs for hot cuts).

²⁷¹ SBC Wardin Reply Aff. at Attach. B; Globalcom Comments at Tab 1, Affidavit of August H. Ankum at para. 10.

70. Globalcom also argues that SBC's EEL NRCs in Wisconsin are not TELRIC-based in violation of checklist item two and preclude competitive entry in contravention of the public interest.²⁷² Globalcom alleges that the total NRCs for a 4-wire DS1 digital loop to DS1 dedicated transport combination for an uncollocated customer in Wisconsin would be \$2,159.08, and that the Wisconsin Commission has not investigated many of the rate elements in the total NRC.²⁷³ Globalcom notes, however, that the Wisconsin Commission found that the EEL NRCs were in a category of rate elements that were likely to be used by only a limited number of carriers,²⁷⁴ and therefore found that, "in light of the limited number of providers utilizing these rate elements, it is reasonable to have the final determinations regarding the application of the [c]ommission's methodologies to take place in the context of negotiation and/or arbitration of interconnection agreements per 47 U.S.C. §§ 251 and 252."²⁷⁵ In its reply, SBC argues that the tariffed EEL NRCs are based on rate structures for DS1 loops and interoffice transport approved by the Wisconsin Commission, and the most recent TELRIC-compliant rates available.²⁷⁶ These tariffed rates are the maximum rate, and carriers can adopt, negotiate, or arbitrate lower rates.²⁷⁷ SBC also asserts that Globalcom is availing itself of the ability to opt into another carrier's interconnection agreement.²⁷⁸

71. Globalcom does not dispute SBC's claim that it is able to negotiate, arbitrate, or opt into existing interconnection agreements to receive lower EEL NRCs than are available through SBC's Wisconsin tariff. It also does not claim to have raised this issue before the Wisconsin Commission. We find that, to the extent Globalcom is not able to negotiate EEL NRCs that it believes are TELRIC-compliant, Globalcom should raise the issue before the Wisconsin Commission in the context of an interconnection agreement arbitration, as the Wisconsin Commission intended.²⁷⁹ Accordingly, we conclude that the current EEL NRCs in Illinois and Wisconsin do not demonstrate a failure to comply with checklist item two.

(ii) Access to UNEs at TELRIC-Compliant Rates

72. Z-Tel submitted extensive comments in opposition to SBC's section 271

²⁷² Globalcom Comments at 24-25.

²⁷³ Globalcom Comments at 24-25.

²⁷⁴ We note that non-collocated carriers will not be entitled to order this type of EEL under the framework adopted in the *Triennial Review Order*. *Triennial Review Order* at para. 597.

²⁷⁵ Globalcom Comments at 25, citing *Wisconsin UNE Compliance Order* at 9.

²⁷⁶ SBC Reply, Vol. 3, Tab 12, Reply Affidavit of Scott T. VanderSanden (SBC VanderSanden Reply Aff.) at para. 10.

²⁷⁷ SBC VanderSanden Reply Aff. at para. 11.

²⁷⁸ SBC VanderSanden Reply Aff. at para. 12.

²⁷⁹ See *Wisconsin UNE Compliance Order* at 9.

application. Z-Tel argues that it cannot opt into SBC's most favorable UNE rates in Illinois and Indiana unless it also agrees to accept amendments to its interconnection agreement that contain onerous reservations of rights provisions and a provision that gives SBC unilateral authority to change rates.²⁸⁰

73. Additionally, Z-Tel argues that SBC's refusal to make available a single set of currently-approved TELRIC-compliant rates and to automatically bill competitive LECs at such rates is unlawful because it results in discriminatory treatment.²⁸¹ Z-Tel believes that by this practice, SBC is maintaining a policy of price discrimination whereby some competitive LECs are given an advantage over others.²⁸² Since July 2002, Z-Tel and SBC have been engaged in formal dispute resolutions before the Illinois and Indiana Commissions over these issues.²⁸³ Z-Tel indicates that it may reach settlement with SBC in the near future.²⁸⁴ In its evaluation, the Department of Justice references Z-Tel's claims, and defers to the Commission's determination whether SBC's conduct could violate the Commission's rules or the Act.²⁸⁵

74. SBC responds that Z-Tel's comments are in the nature of a carrier-to-carrier dispute that is inappropriate for consideration in a section 271 proceeding.²⁸⁶ Despite SBC's position that this issue should be resolved before the state commissions, SBC asserts that competitive LECs are not entitled to an automatic tariff flow-through of rates unless the terms of their interconnection agreements include a provision allowing such,²⁸⁷ that the terms of agreement provisions to which Z-Tel objects were provided only as proposals for good-faith negotiation purposes,²⁸⁸ and that, to date, Z-Tel has not been improperly billed by SBC at higher rates because Z-Tel has not purchased any UNEs from SBC.²⁸⁹ Additionally, SBC argues that the law does not require it to include all TELRIC-compliant rates in a single document or interconnection agreement.²⁹⁰ Despite its position on this issue, however, SBC has developed and submitted into the record of this proceeding a single document for each state clarifying all

²⁸⁰ Z-Tel Comments at 2, 6-9.

²⁸¹ *Id.* at 3-6.

²⁸² *Id.* at 4.

²⁸³ *Id.* at 2.

²⁸⁴ *Id.*

²⁸⁵ Department of Justice Evaluation at 17.

²⁸⁶ SBC Alexander Reply Aff. at paras. 38-40.

²⁸⁷ SBC Alexander Reply Aff. at paras. 43, 45, 48.

²⁸⁸ SBC Alexander Reply Aff. at para. 49.

²⁸⁹ SBC Alexander Reply Aff. at para. 45 n.26.

²⁹⁰ SBC Alexander Reply Aff. at para. 43.

rates it is relying on for each state.²⁹¹ Ultimately, SBC argues, this dispute with Z-Tel should be adjudicated before the state commissions.²⁹²

75. We agree with SBC that this dispute should be resolved before the state commissions. As we have noted in previous orders, the Act authorizes the state commissions to resolve specific carrier-to-carrier disputes arising under the local competition provisions, and it authorizes the federal district courts to ensure the legality of the results of the state arbitration process.²⁹³ In this particular case, the dispute appears to be over the way SBC structures new interconnection arrangements and access to existing arrangements, areas that are squarely within the authority of the states as delineated by the 1996 Act.²⁹⁴ We are reluctant to deny a section 271 application because a BOC is engaged in an unresolved dispute with its competitors before the state commissions, which have primary jurisdiction over the matter.²⁹⁵ We believe this dispute is a local arbitration matter for the appropriate state commissions to decide in the first instance.

2. Access to Operations Support Systems

76. Checklist item two requires a BOC to demonstrate that competitors have nondiscriminatory access to the various systems, databases, and personnel (collectively referred to as OSS) that a BOC uses in providing service to its customers.²⁹⁶ SBC uses the same OSS throughout its Midwest region²⁹⁷ and we recently determined that SBC affords competitors nondiscriminatory access to its OSS in our *SBC Michigan II Order*.²⁹⁸ Consistent with our findings made in the *SBC Michigan II Order*, we determine that SBC has demonstrated that it provides nondiscriminatory access to its OSS in compliance with this checklist item in the remaining four states of this region. As in previous section 271 orders, we focus our review on those OSS issues in controversy and do not address each aspect of SBC's performance where our review of the record satisfies us that there is little or no dispute that SBC complies with its

²⁹¹ SBC September 9 *Ex Parte* Letter at Attach. A-D.

²⁹² SBC Alexander Reply Aff. at para. 39.

²⁹³ See *SWBT Texas Order*, 15 FCC Rcd at 18541, para. 383; see also 47 U.S.C. 252(c), (e)(6); *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

²⁹⁴ 47 U.S.C. § 252(e).

²⁹⁵ *SBC California Order*, 17 FCC Rcd 25718, at para. 120.

²⁹⁶ See *Bell Atlantic New York Order*, 15 FCC Rcd at 3989-90, para. 83.

²⁹⁷ See, e.g., Letter from Geoffrey M. Klineberg, Counsel for SBC, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 03-167, Attach. A at 1 (filed Sept. 12, 2003) (SBC Sept. 12 *Ex Parte* Letter); DOJ Evaluation at 8 ("SBC uses the same [OSS] across all five states in the Ameritech region, including the four involved in the present application. Thus, issues concerning OSS are generally the same throughout the four states.").

²⁹⁸ See *SBC Michigan II Order* at para. 55.

nondiscrimination obligations.²⁹⁹

a. Third-Party Testing

77. Since the Commission must rely on BOC-provided commercial data to evaluate compliance with this and several other checklist items, we must first determine whether those data are indeed reliable and accurate. To do so, we look at several factors – namely, third-party testing of the BOC's OSS, state commission oversight, and the ability of a competitive LEC to audit its carrier-specific data and perform, if necessary, data reconciliations with the BOC.³⁰⁰ Together with its commercial data, SBC submitted into the record the results of two third-party tests, as it did in the *SBC Michigan II* section 271 proceeding. Like Michigan, the two independent auditors are BearingPoint (formerly known as KPMG Consulting, Inc.), whose review is in progress, and Ernst & Young, LLP (E&Y).³⁰¹

78. We reject commenters' concerns regarding the integrity and status of SBC's third-party tests. The third-party tests that SBC submitted in this proceeding are similar to those the Commission has considered and relied on previously³⁰² and, as we have already mentioned above, SBC's OSS are the same across this region. Almost without exception, these commenters raise identical claims and offer the same supporting information as they did in the *SBC Michigan II* proceeding.³⁰³ We rejected those arguments in our *SBC Michigan II Order* and find that it is appropriate to do so here. Thus, we continue to find that the E&Y final test results and the data SBC provided in this joint application are reliable for purposes of determining SBC's checklist compliance.³⁰⁴

²⁹⁹ See, e.g., *SBC Michigan II Order* at para. 55; *Verizon New Jersey Order*, 17 FCC Rcd at 12309, para. 77; *BellSouth Georgia/Louisiana Order*, 17 FCC Rcd at 9144, para. 219.

³⁰⁰ See, e.g., *SBC Michigan II Order* at para. 13 (citing *BellSouth Georgia/Louisiana Order*, *Bell Atlantic New York Order*, *SWBT Texas Order*) (further citations omitted).

³⁰¹ *SBC Michigan II Order* at para. 14.

³⁰² See, e.g., *SBC Michigan II Order* at para. 22.

³⁰³ For example, several commenters contend that the different "materiality" standard used by E&Y masked problems with SBC's OSS that would have been identified if this auditor used the standard followed by BearingPoint (i.e., E&Y would exclude failures from its analysis where the difference between SBC's results and E&Y's results was less than 5% whereas BearingPoint uses a 1% materiality standard). See AT&T Comments at 72. We do not credit this and other criticisms of E&Y's methodology because we have previously considered and relied on third-party tests using substantially similar, if not identical, methodologies. See *SBC Michigan II Order* at para. 22 & n.71 (citing tests performed in Missouri, Texas, and California).

³⁰⁴ See *SBC Michigan II Order* at para. 21. See also, Illinois Commission Comments at 16; Ohio Commission Comments at 2-3 (noting that BearingPoint's "overall test results demonstrate statutory compliance based on information that is sufficiently reliable for purposes of Section 271."); *Wisconsin Commission Phase II Order* at 16 ("the overall [BearingPoint] test results support SBC's claim that its systems satisfy established § 271 standards.").